

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID WEBB,

CASE NO. 3:22-cv-05030-DGE

Plaintiff,

ORDER ADOPTING REPORT AND RECOMMENDATION

KELLY BUSEY et al.,

Defendant.

On January 14, 2022, Plaintiff filed a motion for leave to proceed *in forma pauperis* (IFP") and a proposed complaint alleging various violations of his constitutional rights. (Dkt. 0. 1.)

On February 2, 2022, United States Magistrate Judge David W. Christel found that Plaintiff's proposed complaint did not comply with Federal Rule of Civil Procedure 8(d) and failed to state a claim upon which relief could be granted. (Dkt. No. 4.) Judge Christel issued an order directing Plaintiff to file an amended complaint that addressed these deficiencies by March 4, 2022 and deferred consideration of Plaintiff's IFP motion. (*Id.*)

1 On February 28, 2022, Plaintiff filed a proposed amended complaint. (Dkt. No. 5.) On
2 April 1, 2022, Plaintiff filed a proposed motion seeking a decision on his amended complaint.
3 (Dkt. No. 6.)

4 On April 12, 2022, Judge Christel issued a Report and Recommendation (“R&R”),
5 finding that Plaintiff’s proposed amended complaint did not cure the defects present in the initial
6 complaint, and recommending that this case be dismissed without prejudice, that Plaintiff’s IFP
7 application be denied, and that all pending motions be dismissed as moot. (Dkt. No. 7.)

8 On April 25, 2022, Plaintiff filed objections to Judge Christel’s R&R. (Dkt. No. 8.) On
9 the same day, Plaintiff filed a petition for a writ of mandamus with the United States Court of
10 Appeals for the Ninth Circuit, arguing that the Court allowed his case to sit idle for five months
11 without either screening his complaint or addressing his IFP petition. (Dkt. Nos. 9 and 10.)

12 With respect to Plaintiff’s appeal, the Court notes that a federal district court and a
13 federal court of appeals “should not attempt to assert jurisdiction over a case simultaneously.”
14 *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400 (1982) (per
15 curiam). Generally, “[t]he filing of a notice of appeal is an event of jurisdictional significance—it
16 confers jurisdiction on the court of appeals and divests the district court of its control over those
17 aspects of the case involved in the appeal.” (*Id.*)

18 However, when a Notice of Appeal is defective in that it refers to a non-appealable
19 interlocutory order, it does not transfer jurisdiction to the appellate court, and so the ordinary rule
20 that the district court cannot act until the mandate has issued on the appeal does not
21 apply.” *Nascimento v. Dummer*, 508 F.3d 905, 908 (9th Cir.2007). In such a case, the district
22 court “may disregard the purported notice of appeal and proceed with the case, knowing that it
23 has not been deprived of jurisdiction.” *Ruby v. Sec’y of the U.S. Navy*, 365 F.2d 385, 389 (9th
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1 Cir. 1966).

2 The Ninth Circuit has held that a magistrate judge's recommendation of dismissal is not a
3 final, appealable order absent consent by the parties. *See Serine v. Peterson*, 989 F.2d 371, 372-
4 73 (9th Cir. 1993) (magistrate judge's findings and recommendations not appealable; premature
5 appeal not cured by subsequent entry of final judgment by district court). Accordingly, the Court
6 finds that it retains jurisdiction over this matter.

7 The Court, having reviewed the Report and Recommendation of Judge David W.
8 Christel, objections to the Report and Recommendation, and the remaining record, does hereby
9 find and ORDER:

- 10 (1) The Court ADOPTS the Report and Recommendation (Dkt. No. 7).
- 11 (2) The Application to Proceed IFP (Dkt. No. 1) is DENIED, all pending proposed motions
12 are denied as MOOT, and this case is DISMISSED without prejudice.
- 13 (3) The Clerk is directed to send copies of this Order to Plaintiff, counsel for Defendants, and
14 to the Hon. David W. Christel.

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16 Dated this 16th day of May, 2022.

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David G. Estudillo
United States District Judge